In the
Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-689

ALEXANDER SHARP, II,
COMMISSIONER OF THE MASSACHUSETTS
DEPARTMENT OF PUBLIC WELFARE,
APPELLANT,

v.

CINDY WESTCOTT, ET AL.,
APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Brief for the Appellant

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Opinions Below

The opinion of the District Court (Fed. J.S. App. 1A-37A) which accompanied its order of April 20, 1978 (Fed. J.S. App. 39A-42A), declaring 42 U.S.C. § 607 (1976) unconstitutional

in part, is not yet reported.[1] The District Court's order of August 9, 1978 (State J.S. App. 13a-14a), is not reported.[2]

Jurisdiction

On April 20, 1978, the United States District Court for the District of Massachusetts entered an order declaring unconstitutional and enjoining the enforcement of a portion of 42 U.S.C. § 607 (1976) (Fed. J.S. App. 39A-42A). The Secretary of the United States Department of Health, Education, and Welfare (Secretary) and the Commissioner of the Massachusetts Department of Public Welfare (Commissioner) were defendants in that action. On May 18, 1978, the Secretary filed a notice of his appeal to this Court from that order pursuant to 28 U.S.C. § 1252 (1976) (Fed. J.S. App. 43A-44A).

The District Court's initial order also required the Commissioner to reformulate the public assistance program established by 42 U.S.C. § 607 (1976) in order to correct its underinclusiveness. On June 7, 1978, the Commissioner filed a motion to clarify or, alternatively, to amend the District Court's order of April 20, 1978, in order to obtain a definitive ruling from the District Court on whether his proposed plan to correct the underinclusiveness of 42 U.S.C. § 607 (1976) was a permissible remedy (State J.S. App. 3a-11a). On August 9, 1978, the District Court denied the Commissioner's motion on its merits (State J.S. App. 13a-14a). On August 24, 1978, the Commissioner filed a notice of his appeal from that final order to this

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[1] This brief will refer to the elements of the record reprinted in the appendix to the jurisdictional statement in the consolidated case of *Califano* v. *Westcott*, No. 78-437, as: (Fed. J.S. App.).

[2] This brief will refer to the elements of the record reprinted in the appendix to the jurisdictional statement in this case as: (State J.S. App.).

Court pursuant to 28 U.S.C. § 1252 (1976) (State J.S. App. 15a). The Commissioner filed his jurisdictional statement on October 23, 1978. This Court noted probable jurisdiction on December 11, 1978, and consolidated this case with the Secretary's appeal in *Califano* v. *Westcott*, No. 78-437 (A. 66).

Where one party has previously appealed to this Court pursuant to 28 U.S.C. § 1252 (1976) from a decision holding an act of Congress unconstitutional, section 1252 provides that:

> A party who has received notice of appeal under this section shall take any subsequent appeal or cross appeal to the Supreme Court.

Cases supporting this Court's jurisdiction include *McLucas* v. *DeChamplain*, 421 U.S. 21 (1975), and *United States* v. *Raines*, 362 U.S. 17 (1960).

Statutory Provision Involved

The validity of section 407 of the Social Security Act, 42 U.S.C. § 607 (1976) (Fed. J.S. App. 45A-48A), and Massachusetts' implementing regulations (A. 22-26) is involved. The text of section 407 is set forth at pages 653-654 of volume 10 of the United States Code (1976). The text of the challenged portions of Massachusetts' Code of Human Services Regulations (CHSR) appears in Mass. Reg. Special Issue No. 8 at pp. 11 and 22 (1976) and Mass. Reg. Issue No. 41 at pp. 60-61 (1977).

Question Presented

Whether the District Court selected an improper remedy for sex discrimination when it ordered that public assistance

which had previously been available to a two-parent family only if the father were unemployed must be extended to such families if either parent were unemployed, thereby rejecting the more limited sex-neutral remedy of extending assistance to only those families whose principal wage-earner was unemployed.

Statement

The Social Security Act of 1935 (Act) established the Aid to Families with Dependent Children (AFDC) program, as it is now known, to provide financial assistance to families whose children were needy because of the death, absence or incapacity of a parent. 42 U.S.C. §§ 601 *et seq.* (1976) (originally enacted by 49 Stat. 627-629 (1935)). The Congressional purpose behind the AFDC program was to have the federal and state governments assume financial responsibility for "children in families without a 'breadwinner,' 'wage earner,' or 'father,'" *King* v. *Smith*, 392 U.S. 309, 328 (1968), in order "to allow widows and divorced mothers to care for their children at home without having to go to work." *Batterton* v. *Francis*, 432 U.S. 416, 418 (1977). Under the program, the Secretary determines whether the plan of a state electing to participate in AFDC meets the standards set forth in 42 U.S.C. § 602 (1976). If so, that state is entitled to receive partial federal reimbursement for both the cost of the benefits which it provides and its administrative costs. 42 U.S.C. § 603 (1976). If a state also elects to participate in the medical assistance (Medicaid) program established under the Act, individuals receiving AFDC benefits are automatically entitled to receive Medicaid benefits. 42 U.S.C. § 1396a(a)(10) (1976).

In 1961, Congress expanded the AFDC program "to assist children who are needy simply because the family breadwinner is unable to find work." *Batterton* v. *Francis*, 432 U.S. 416, 419 (1977).[3] Congress undertook this expansion by adding section 407 to the Act. 75 Stat. 75 (1961). As subsequently amended by 81 Stat. 882 (1968), section 407 redefined the class of eligible families to include those whose children were needy simply because of their father's unemployment.[4] This supplementary component of the AFDC program is known as the Aid to Families with Dependent Children, Unemployed Father (AFDC-UF) program. All requirements of the AFDC program (other than the requisite death, absence, or incapacity of a parent) apply to the AFDC-UF program.[5] Along with approximately one-half of the states,[6] Massachusetts has elected to participate in the AFDC-UF program.[7] In conformity with section 407, Massachusetts has defined eligibility for its AFDC-UF program in terms of the unemployment of the father.[8]

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[3] *See also* H.R. Rep. No. 28, 87th Cong., 1st Sess. 3 (1961); S. Rep. No. 165, 87th Cong., 1st Sess. 2-3 (1961), *reprinted in* [1961] U.S. Code Cong. & Ad. News 1716, 1717.

[4] This Court has reviewed the development of the AFDC-UF program in *Philbrook* v. *Glodgett*, 421 U.S. 707, 709-711 (1975), and *Batterton* v. *Francis*, 432 U.S. 416, 419-420 (1977).

[5] In short, AFDC-UF provides to certain intact (*i.e.*, two-parent) families what AFDC provides to families with only one parent (or two parents where one is incapacitated) in the home. For purposes of AFDC eligibility, an incapacitated parent is one whose physical or mental ability to provide parental care has been substantially reduced. 45 C.F.R. § 233.90(c)(1)(iv) (1977). The administrative structure of the AFDC-UF program is explained more fully *infra* at 27-34.

[6] *Batterton* v. *Francis*, 432 U.S. 416, 420 (1977).

[7] 6 Mass. CHSR III, Subch. A, Pt. 301, § 301.03 [Mass. Reg. Special Issue No. 8 at 11 (1976)] and Subch. A, Pt. 303, Subpt. A, § 303.04 [Mass. Reg. Issue No. 41 at 60-61 (1977)].

[8] 6 Mass. CHSR III, Subch. A, Pt. 303, Subpt. A, § 303.01 [Mass. Reg. Special Issue No. 8 at 22 (1976)].

In January, 1977, plaintiffs filed this class action pursuant to 28 U.S.C. §§ 1331 and 1343 (1976) in the United States District Court for the District of Massachusetts asserting that section 407 and the implementing state regulations violated their equal protection rights under the Fifth Amendment's Due Process Clause and the Fourteenth Amendment respectively (A. 17-18).[9] Plaintiffs argued that the statutory classification was fatally underinclusive because it failed to provide AFDC-UF benefits on the basis of the mother's unemployment in a family which was otherwise identical to an eligible family. The complaint sought declaratory and injunctive relief against the continued enforcement of section 407 and the state regulations (A. 19-20).

Plaintiffs moved for certification of their class and for summary judgment on their federal constitutional claims. The Secretary opposed their summary judgment motion on the merits, but at the same time argued that the proper remedy, should one be needed, was to extend, rather than strike down, the AFDC-UF program. The Commissioner adopted the Secretary's arguments in defense of section 407, and went on to argue independently in favor of extension of the AFDC-UF program. On April 20, 1978, the District Court certified a class consisting of all families within Massachusetts which would be eligible for the AFDC-UF program but for its exclusion of families in need because of the mother's unemployment (Fed. J.S. App. 39A-40A). On the merits, the court ruled that the statutory classification was invalid as underinclusive (Fed. J.S. App. 33A). It then addressed the question of how, as a matter of remedy, to cure the underinclusiveness of the AFDC-UF program. In accordance with Justice Harlan's

[9] Plaintiffs additionally challenged the validity of Massachusetts' regulations implementing the AFDC-UF program under the state constitutional provision that "[e]quality under the law shall not be denied or abridged because of sex . . ." (A. 18-19). See Mass. Const., amend. art. 106.

seminal opinion concurring in *Welsh* v. *United States*, 398 U.S. 333 (1970), the District Court recognized that it had "two remedial choices: elimination of the AFDC-U subprogram altogether because of its constitutional imperfection or extension of AFDC-U . . . benefits to those persons previously unconstitutionally excluded" (Fed. J.S. App. 34A).[10] It accordingly set out to decide "'whether it more nearly accords with Congress' wishes to eliminate its policy altogether or extend it in order to render what Congress plainly did intend, constitutional,'" citing Justice Harlan's opinion in *Welsh*, 398 U.S. at 355-356 (Fed. J.S. App. 34A). Upon its decision to extend the AFDC-UF program to the plaintiff class, the District Court ordered the Commissioner "to grant AFDC and Medicaid benefits to families with children deprived of support or care because of the unemployment of the mother in the same amounts and under the same standards as he provides such benefits to families deprived of support or care because of the unemployment of the father . . ." (Fed. J.S. App. 41A-42A). The District Court also enjoined the Secretary from the enforcement of section 407 "insofar as it prohibits defendant Califano from approving a Massachusetts plan or federal matching funds for Massachusetts to pay AFDC or Medicaid benefits to families deprived of support or care due to the unemployment of the mother" (Fed. J.S. App. 40A-41A). The operative effect of these orders was to place upon the Commissioner rather than the Secretary the responsibility for designing a valid sex-neutral AFDC-UF program.

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[10] In his concurring opinion in *Welsh* v. *United States*, 398 U.S. at 361, Justice Harlan had declared that:

> Where a statute is defective because of underinclusion there exist two remedial alternatives: a court may either declare it a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by exclusion.

On May 10, 1978, the Commissioner moved for a partial stay of the court's initial order until August 1, 1978, to allow him to develop and implement a plan for compliance with that order (A. 43-48). In that motion, he indicated his intention to consider whether the unemployment of a family's principal wage-earner could validly become the standard of eligibility in a sex-neutral AFDC-UF program (A. 44). While granting the requested stay, the District Court did, at plaintiffs' urging, point out in its order of May 31, 1978, that its original order did not "contain any language which authorizes the imposition of . . . a primary wage earner limitation . . . on the awarding of AFDC-UF and/or Medicaid benefits by the defendant Sharp" (State J.S. App. 2a). In order to resolve whether the District Court's original order required him to provide AFDC-UF benefits to families upon the unemployment of either parent regardless of the employment status of the other parent (the *dual wage-earner model* of the AFDC-UF program) or only upon the unemployment of the family's principal wage-earner (the *principal wage-earner model* of the AFDC-UF program), the Commissioner then moved the District Court to clarify or, alternatively, to amend its initial order to permit the provision of AFDC-UF benefits only to families deprived of support by the principal wage-earner's unemployment (State J.S. App. 3a-11a).[11] Plaintiffs opposed this motion. On July 19, 1978, the District Court extended its stay of its initial order until October 1, 1978, so that it could

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[11] As an appendix to his motion to clarify or, alternatively, to amend the District Court's order of April 20, 1978, the Commissioner attached a proposed amendment to the state AFDC-UF regulations which redefined eligibility in terms of deprivation caused by the unemployment of the family's principal wage-earner. In pertinent part, the proposed amendment defined the principal wage-earner as that parent whose earnings were greater during the six months preceding the month of application, reapplication or redetermination of eligibility (State J.S. App. 6a-11a).

give further consideration to the Commissioner's motion. It also permitted the parties to submit further documents supporting their respective positions on the principal wage-earner issue (State J.S. App. 12a). Plaintiffs advocated the dual wage-earner model on the ground that, as the father's unemployment had previously been sufficient to establish eligibility, the mother's unemployment should now similarly be sufficient to establish eligibility under a sex-neutral AFDC-UF program regardless of the father's concurrent employment. The Secretary remained silent on this issue.

On August 9, 1978, the District Court denied the Commissioner's motion to clarify or, alternatively, to amend its order of April 20, 1978. Its reasons were that: (1) any reformulation of the AFDC-UF program that would go beyond its initial order should be left to Congress, and (2) it could not authorize Massachusetts to narrow the federal standard of eligibility for the AFDC-UF program (State J.S. App. 13a-14a). By its refusal to adopt the principal wage-earner model of the AFDC-UF program, the District Court necessarily approved the remedy advanced by the plaintiffs. Accordingly, on August 24, 1978, the Commissioner filed his notice of appeal on the issue of remedy (State J.S. App. 15a).

Summary of Argument

This appeal presents a narrow but significant issue of remedy. As written by Congress, section 407 provides assistance to a needy family whose father has a work history but is unemployed. If section 407's failure to provide assistance to a needy family whose mother is similarly unemployed is held unconstitutional, the remedial issue is what form of a sex-neutral AFDC-UF program, if any, would

Congress have established if it had known of section 407's underinclusiveness when it enacted that statute. *See Welsh* v. *United States*, 398 U.S. 333, 355-367 (1970) (Harlan, J., concurring). The proper remedy is that which produces a sex-neutral AFDC-UF program consonant with section 407's legislative history and administrative framework.

As evidenced by legislative history, the wholly proper rationale behind section 407 was to include a two-parent family in AFDC if, and only if, its principal wage-earner were unemployed. Congress meant to assist families whose need was occasioned by their breadwinners' temporary loss of employment. The improper sex stereotype, as found by the District Court, lay in section 407's unyielding definition of the family breadwinner as the father (Fed. J.S. App. 29A-31A). If that stereotype is stricken from the law, what remains is a program to aid families whose principal wage-earner, whether male or female, is unemployed.

Examined under the light of legislative history, the District Court's remedy is revealed as too broad. Its dual wage-earner model of eligibility produces an open-ended expansion of the AFDC-UF program going far beyond what Congress intended. Since either parent's unemployment would trigger assistance, a family could receive assistance as long as either parent (rather than just the principal wage-earning parent) remained unemployed. After such a family had once established its eligibility, it could by virtue of federal law remain eligible until its annual gross income equaled — for example — $16,340 for an average family of five. As a result, the dual wage-earner model would indefinitely supplement the income of a large number of families that are not needy by conventional standards. For this reason, the District Court's remedy overreaches Congress' conception of AFDC-UF as a temporary supplement to families impoverished by their breadwinners' unemployment.

In choosing between these proposed alternative remedies, the District Court ignored their comparative costs as an index of how Congress itself would have elected to cure section 407's underinclusiveness. The dual wage-earner model would add $23,000,000 in AFDC benefits to the annual cost of Massachusetts' AFDC-UF program, which stood at $30,000,000 prior to the District Court's ruling. By contrast, the principal wage-earner model would add only $3,300,000. The fiscal ramifications of the dual wage-earner model indicate that it is not the alternative most reflective of Congressional intent. *See Quern* v. *Mandley*, 436 U.S. 725, 745-746 (1978).

The principal wage-earner model is consistent with past practice under the AFDC-UF program of conditioning eligibility upon the father's unemployment regardless of the mother's employment. The goal of the principal wage-earner model is simply to condition eligibility upon the unemployment of that parent who is in fact the family breadwinner, regardless of the other parent's employment status.

Argument

A Sex-Neutral AFDC-UF Program Must, as a Matter of Federal Law, Condition Eligibility upon the Unemployment of the Family's Principal Wage-Earner.

A. *The Separation of Powers Principle Supports the Commissioner's Argument.*

The Commissioner's motion to clarify or, alternatively, to amend the District Court's order of April 20, 1978, presented a single question: whether the legislative history and statutory framework of the AFDC-UF program dictated the replace-

ment of the invalid term "father" by a sex-neutral reference to the family's principal wage-earner as the parent whose unemployment can establish eligibility under section 407 (State J.S. App. 3a-5a). Three precepts of the federal common law of remedies govern the answer to that question. First, the judiciary may extend a statutory classification to cure its underinclusiveness only where Congress would itself have elected to do so. The judiciary's power is limited to rendering "what Congress plainly did intend . . . constitutional."[12] In this case, the Court must determine what form of a sex-neutral AFDC-UF program, if any, Congress would have established if it had known of section 407's constitutional defect when it enacted that statute.[13] Second, the judiciary should only "hazard the necessary statutory repairs if they can be made within the administrative framework of the statute and without impairing other legislative goals . . .."[14] In sum, the Congressional intent underlying a statutory classification and its administrative structure determine the form which judicial extension must take.[15]

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[12] *Welsh* v. *United States*, 398 U.S. 333, 356 (1970) (Harlan, J., concurring).

[13] *See* Note, *Extension Versus Invalidation of Underinclusive Statutes: A Remedial Alternative*, 12 Colum. J.L. and Soc. Probs. 115, 121-122 (1975).

[14] *Welsh* v. *United States*, 398 U.S. 333, 366 (1970) (Harlan, J., concurring). Elsewhere in his concurring opinion, Justice Harlan accordingly cautioned that:

> [I]t is, of course, necessary to . . . consider the degree of potential disruption that would occur by extension as opposed to abrogation. 398 U.S. at 365.

[15] When the District Court selected the dual wage-earner model over the principal wage-earner model, it observed that Massachusetts could not restrict the federal definition of eligibility for the AFDC-UF program (State J.S. App. 13a-14a). This observation reflected a misunderstanding of the Commissioner's position. The Commissioner had, rather, argued — and

These two precepts for the remedial extension of a legislative classification stem from the constitutional principle of separation of powers. To extend a statutory class without a strong showing of tacit Congressional approval would ignore the basic tenet that legislatures, not courts, are elected to make laws.[16] A third outgrowth of that fundamental principle is the well-established maxim — applied recently in this Court's desegregation decisions — that a remedy ought not to exceed the scope of the constitutional violation which it cures.[17] The

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argues now — that a sex-neutral AFDC-UF program must, as a matter of federal law, adhere to the principal wage-earner model when it discards section 407's sex stereotypes. The District Court's parallel observation that any further reformulation of the AFDC-UF program should be left to Congress is, therefore, similarly inapposite.

[16] *See Ferguson* v. *Skrupa*, 372 U.S. 726, 729 (1963). *Accord, Moss* v. *Secretary of Health, Education and Welfare*, 408 F. Supp. 403 (M.D. Fla. 1976), where the three-judge District Court sustained an equal protection challenge to a provision of the Social Security Act requiring husbands, but not wives, to demonstrate dependency in order to obtain certain benefits. The court declined, however, to extend the benefit of this underinclusive provision on the ground that:

> Any enlargement in the coverage of the Act, necessitating an immense increase in governmental expenditure, would effectively exercise a power reserved exclusively to Congress by the Constitution; and a judicial selection of that remedy in this case would clearly impinge upon the constitutional concept of separation of powers.

Id., 414. The District Court elected, therefore, to require both husbands and wives to demonstrate dependency in order to obtain the benefits. *See also* Frug, *The Judicial Power of the Purse*, 126 U. Pa. L. Rev. 715, 749-750 (1978).

[17] *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424, 433-437 (1976) (court's remedial power extends only as far as necessary to eradicate constitutional violations found to exist); *Milliken* v. *Bradley*, 418 U.S. 717 (1974) (desegregation remedy could not lawfully be imposed beyond the municipal boundaries within which segregation had been shown to occur); *see Swann* v. *Charlotte-Mecklenberg Board of Education*, 402 U.S. 1, 16

judiciary may, therefore, properly exercise its remedial power only so far as is necessary to right the wrong before it.

Viewed from this perspective, the principal wage-earner model of the AFDC-UF program is the superior remedy for section 407's underinclusiveness. By comparison with the open-ended expansion of the AFDC-UF program which plaintiffs advocate, it constitutes a moderate remedy in harmony with the contours of both the legislative history underlying section 407 and its administrative structure. The principal wage-earner model is also a complete remedy because it would provide assistance to families on the basis of the unemployment of male and female breadwinners alike. The principal wage-earner model should, therefore, be adopted because it does not, unlike the dual wage-earner model, exceed the scope of the sex-discriminatory defect in section 407 which it would cure.

B. *Section 407's Legislative History Demonstrates the Propriety of the Principal Wage-Earner Model of the AFDC-UF Program.*

The very legislative intent behind section 407 which, in the view of the District Court (Fed. J.S. App. 34A-37A), empowered it to recast the AFDC-UF program in a sex-neutral form also required the District Court to condition eligibility upon the unemployment of the family's principal wage-earner. Section 407 represents Congress' extension of the

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(1971) (task of federal court is to correct the condition that offends the Constitution); *cf. Milliken* v. *Bradley*, 433 U.S. 267 (1977) (broad remedy in desegregation case upheld; although court went beyond student assignment for desegregation purposes and ordered remedial educational programs, the result was deemed justified by the need to compensate for pervasive effects of past segregation).

original AFDC program to two-parent families. This departure from the single-parent model of AFDC was significant in concept but relatively limited in scope. Its goal was to alleviate the plight of families whose breadwinner had become unemployed. Section 407's gender-based limitation reflected Congress' assumption that the principal wage-earners whose unemployment would impoverish families were fathers, not mothers.

Congress did not intend to permit the unemployment of either parent to trigger assistance regardless of the other parent's employment status. Such a dual wage-earner model of the AFDC-UF program would work a fundamental change in this nation's system of public assistance because it would aid two-parent families even if the unemployed parent had only been a casual member of the labor force. AFDC-UF would then provide a guaranteed annual income to all needy families, including the so-called working poor — those families where the principal wage-earner is employed, but at such a low wage that the family remains financially eligible for assistance. In this guise, the AFDC-UF program would no longer serve just to tide families over the temporary need occasioned by the breadwinner's unemployment. It would instead furnish an indefinite — perhaps permanent — supplement to the low wages earned by a family's principal wage-earner. Nothing could be further from Congress' intent, as shown below.

In his State of the Union Message of January 30, 1961, President John F. Kennedy announced that:

> The present state of our economy is disturbing. . . . Of some 5½ million Americans who are without jobs, more than 1 million have been searching for work for more than 4 months. And during each month some 150,000 workers are exhausting their already meager jobless benefit rights. . . .

> I will propose to Congress within the next 14 days measures to improve unemployment compensation through temporary increases in duration on a self-supporting basis — to provide more food to the families of the unemployed, and aid to their needy children . . ..[18]

On February 2, 1961, President Kennedy amplified his earlier proposals in his Message on Economic Recovery and Growth. After repeating his intention to seek a temporary extension of unemployment benefits, he declared that:

> Under the aid to dependent children program, needy children are eligible for assistance if their fathers are deceased, disabled, or family deserters. *In logic and humanity, a child should also be eligible for assistance if his father is a needy unemployed worker — for example, a person who has exhausted unemployment benefits and is not receiving adequate local assistance.* . . .
>
> I recommend that the Congress enact an interim amendment to the aid to dependent children program to include the children of the needy unemployed.[19]

The administration subsequently filed twin bills to extend unemployment compensation and to authorize federal financial participation in aid to dependent children of unemployed parents.[20]

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[18] The State of the Union Message, January 30, 1961, *reprinted in* [1961] U.S. Code Cong. & Ad. News 25, 26-27.

[19] President's Message on Economic Recovery and Growth, February 2, 1961, H.R. Doc. 81, 87th Cong., 1st Sess., *reprinted in* [1961] U.S. Code Cong. & Ad. News 1028, 1032-33 (emphasis added).

[20] H.R. 3864, 87th Cong., 1st Sess. (1961); H.R. 3865, 87th Cong., 1st Sess. (1961).

The administration bill (H.R. 3865) proposed to establish an AFDC-UF program for the period from April 1, 1961, to June 30, 1962, which would condition benefits upon "the unemployment of a parent."[21] Its declared purpose was, more specifically, "to make assistance . . . available to needy families in which the *breadwinner* is unemployed."[22] As a supplement to the temporary extension of unemployment insurance, the AFDC-UF program was directed toward "unemployed persons who either do not qualify for unemployment compensation benefits, have exhausted their benefits, or who, due to the size of their families or other special needs, will not receive enough from unemployment compensation to live in health and decency."[23] The joint thrust of these twin programs was thus to relieve the plight of families whose "breadwinners" had been left unemployed by a national recession.[24]

At the hearings on H.R. 3865 before the House Committee on Ways and Means, both the Secretary of Health, Education and Welfare and the Committee Chairman, Representative Mills (who had sponsored H.R. 3865), expressed their under-

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[21] H.R. 3865, 87th Cong., 1st Sess. § 1 (1961).

[22] H.R. 3865, 87th Cong., 1st Sess. § 2 (1961) (emphasis added).

[23] *Temporary Unemployment Compensation and Aid to Dependent Children of Unemployed Parents: Hearings on H.R. 3864 and H.R. 3865 Before the House Committee on Ways and Means*, 87th Cong., 1st Sess. 94 (1961) (statement of Abraham Ribicoff, Secretary of Health, Education, and Welfare) [hereinafter cited as *1961 Hearings*). As to the interrelationship of H.R. 3864 and H.R. 3865, *see also 1961 Hearings*, at 48 (statement of Hon. Arthur Goldberg, Secretary of Labor).

[24] *E.g.*, 107 Cong. Rec. 2941, 3759 (1961) (remarks of Rep. Lane). *See also* 107 Cong. Rec. 3761-64 (1961) (remarks of Reps. Perkins and Doyle); 107 Cong. Rec. 3769-70 (1961) (remarks of Rep. Machrowicz); and 107 Cong. Rec. 3770-71 (1961) (remarks of Rep. Ullman).

standing that H.R. 3865 — which was expressly aimed at the families of unemployed breadwinnners — authorized the provision of AFDC benefits to families rendered needy by the father's unemployment.[25] Although the language of H.R. 3865 referred simply to the "unemployment of a parent," its

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[25] *1961 Hearings, supra* note 23, at 103-04:

> THE CHAIRMAN. Mr. Secretary, it would seem that the record can be made a little clearer on what is being suggested in this bill.
>
> What we propose to do in this bill, H.R. 3865, is to amend the section of the Federal law making funds available to States in discharging the responsibilities that the State feels it has with respect to the care of dependent children who are in need?
>
> SECRETARY RIBICOFF. That is correct, Mr. Chairman.
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> . . . . . .
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> THE CHAIRMAN. What we are suggesting here is this: that the definition of a dependent child be extended to permit that definition to include as a dependent child a needy child under the age of 18, along with the other things that are set forth in existing law, whose father is unemployed.
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> SECRETARY RIBICOFF. That is correct, Mr. Chairman.
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> THE CHAIRMAN. That is all we are saying?
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> SECRETARY RIBICOFF. That is all.
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> . . . . . .
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> THE CHAIRMAN. And we do that because we recognize, as you suggest, and I had this thought in mind in introducing the bill, that children may be just as needy with a father in the household unable to supply income to the family because of lack of work, as those children could be under the existing law with the father leaving the home and letting them qualify then in his absence from the home.
>
> SECRETARY RIBICOFF. That is correct, Mr. Chairman.

For further references to the unemployment of the father by Secretary Ribicoff and the Department of Health, Education, and Welfare, see *1961 Hearings, supra* note 23, at 5, 95, 99, and 101. For similar references by other Committee members, see *1961 Hearings, supra* note 23, at 100.

own sponsors thus understood that AFDC-UF benefits were to be provided in the event of a father's unemployment.

Subsequent legislative history confirms that (1) Congress enacted the AFDC-UF program to aid families with unemployed breadwinners and (2) Congress assumed that these breadwinners were fathers. In their reports recommending the enactment of the AFDC-UF program, the House Committee on Ways and Means and the Senate Finance Committee uniformly stated that the purpose of the AFDC-UF program was to assist needy families "in which the breadwinner is unemployed."[26] During the floor debates in the House, several members of the Committee on Ways and Means similarly emphasized that the goal of the AFDC-UF program was to assist families rendered needy by the unemployment of their "breadwinner."[27] Other Representatives referred interchangeably to "breadwinners,"[28] "wage-earners,"[29] or "fathers"[30] in this regard.

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[26] H.R. Rep. No. 28, 87th Cong., 1st Sess. 2, 3 (1961); S. Rep. No. 165, 87th Cong., 1st Sess. 1, 2-3 (1961), *reprinted in* [1961] U.S. Code Cong. & Ad. News 1716, 1717. Witnesses at the hearings on H.R. 3865 before the House Committee on Ways and Means had similarly expressed their understanding that the AFDC-UF program was intended to assist the needy families of unemployed breadwinners. *E.g.*, *1961 Hearings*, *supra* note 23, at 211, 227 (statement of John Tramberg on behalf of the American Public Welfare Association) ("breadwinner parent") and at 296, 304 (statement of Nelson Cruikshank on behalf of the AFL-CIO) ("family breadwinners").

[27] 107 Cong. Rec. 3767-68 (1961) (remarks of Rep. Byrnes); 107 Cong. Rec. 3770 (1961) (remarks of Rep. Ullman); 107 Cong. Rec. 3771 (1961) (remarks of Rep. Karsten).

[28] 107 Cong. Rec. 3759 (1961) (remarks of Rep. Lane); 107 Cong. Rec. 3763-64 (1961) (remarks of Rep. Doyle).

[29] 107 Cong. Rec. 3768 (1961) (remarks of Rep. McCormack). See also 107 Cong. Rec. 6401 (1961) (remarks of Sen. McCarthy).

[30] 107 Cong. Rec. 1795, 3761, 3766 (1961) (remarks of Rep. Mills); 107 Cong. Rec. 3769 (1961) (remarks of Rep. Cohelan).

This legislative focus on the unemployment of the breadwinner, whom Congress assumed to be the father, demonstrates that Congress envisioned a principal wage-earner model of the AFDC-UF program. The term "breadwinner" denotes that "member of a family or household whose wages *solely* or *largely* defray its living expenses."[31] In short, the breadwinner is the family's principal wage-earner.[32] By definition, a family can have only one principal wage-earner. Therefore, although either parent can become the family's breadwinner, the very meaning of that term precludes both parents from simultaneously qualifying as the family breadwinner.[33]

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[31] Webster's Third New International Dictionary (1964) (emphasis added).

[32] The District Court itself recognized that:

> The legislators at times during the Congressional debates used the term "father" interchangeably with the terms "bread-winner," "worker" and "wage earner." This usage apparently reflected their belief that the father is generally the *primary wage earner* of the family and the mother the "homemaker" (Fed. J.S. App. 24A at n. 15) (emphasis added).

In *King* v. *Smith*, 392 U.S. 309, 328 (1968), where this Court reviewed the Congressional debates preceding the establishment of the basic AFDC program by the Social Security Act of 1935, it found that the legislators similarly used the terms "breadwinner," "wage earner," and "father" interchangeably.

[33] The legislative history of H.R. 3864, the companion bill to extend unemployment compensation, indicates that at least certain members of the House Committee on Ways and Means were keenly aware of the concept of a family's principal wage-earner. The Minority Report on the version of H.R. 3864 reported by the Committee criticized the majority for its failure to identify "the unemployed as to whether they are the principal wage earners in their families or are instead supplementary wage earners or even casual members of the labor force." H.R. Rep. No. 27, 87th Cong., 1st Sess. 41 (1961). In the hearings on H.R. 3864 before the Committee, Representative Alger questioned Secretary of Labor Goldberg at length in an effort to deter-

In 1962, Congress voted to extend the AFDC-UF program until June 30, 1967.[34] The legislative history of the extension echoes that of 75 Stat. 75 (1961) which established the AFDC-UF program. The House Committee on Ways and Means understood the program to be directed to the unemployment of the father.[35] During the floor debates in the House, several members of the Committee again emphasized that the AFDC-UF program was intended to assist families deprived of support by the unemployment of the "breadwinner."[36] During the floor debates in the Senate, members of the Senate Finance

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mine "what percentage of the newly accredited unemployed carried on your rolls, as unemployed, are housewives, that is, they are not principal breadwinners . . .." *1961 Hearings, supra* note 23, 73. The following colloquy ensued:

> MR. ALGER. Mr. Secretary, . . . we would like to find out how many of these people are not principal breadwinners . . ..
>
> SECRETARY GOLDBERG. . . . For example, . . . taking Little Rock, 83 percent of the claimants for temporary benefits who were men were married. This would indicate that this man is a man who has to support his family.
>
> MR. ALGER. The breadwinner, in other words.
>
> SECRETARY GOLDBERG. Yes, sir.

1961 Hearings, supra note 23, 74.

[34] Public Welfare Amendments of 1962, Pub. L. No. 87-543, § 131(a), 76 Stat. 193 (1962).

[35] H.R. Rep. No. 1414, 87th Cong., 2d Sess. 9 (1962). *See also* 108 Cong. Rec. 14139 (1962) (remarks of Rep. Mills, Chairman of the House Committee on Ways and Means).

[36] 108 Cong. Rec. 4272 (1962) (remarks of Rep. Keogh); 108 Cong. Rec. 4282 (1962) (remarks of Rep. Burke); 108 Cong. Rec. 12513 (1962) (remarks of Rep. Byrnes). Other Representatives followed this characterization. *E.g.*, 108 Cong. Rec. 1187 (1962) (remarks of Rep. Riehlman).

Committee[37] and other Senators[38] indicated their understanding that the AFDC-UF program was directed to families with unemployed fathers. The Chairman of the Senate Finance Committee reported that:

> It has made the unemployed father feel like the breadwinner again . . ..[39]

In 1967, Congress confirmed that the AFDC-UF program was limited to families in which the breadwinner was unemployed. It amended section 407, which had since 1961 conditioned eligibility upon the unemployment of a "parent," to make the unemployment of the "father" the prerequisite to eligibility for the program.[40] The House and Senate committee reports uniformly stated that:

> This program was orginally conceived as one to provide aid for the children of unemployed fathers. However, some States make families in which the father is working but the mother is unemployed eligible. The bill would not allow such situations. Under the bill, the program could apply only to the children of unemployed fathers.[41]

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[37] 108 Cong. Rec. 12661 (1962) (remarks of Sen. Kerr); 108 Cong. Rec. 13879 (1962) (remarks of Sen. Byrd).

[38] *E.g.*, 108 Cong. Rec. 13871-72 (1962) (remarks of Sen. Randolph).

[39] 108 Cong. Rec. 13879 (1962) (remarks of Sen. Byrd).

[40] Pub. L. No. 90-248, § 203(a), 81 Stat. 882 (1968).

[41] H.R. Rep. No. 544, 90th Cong., 1st Sess. 108 (1967); S. Rep. No. 744, 90th Cong., 1st Sess. 160 (1967), *reprinted in* [1967] U.S. Code Cong. & Ad. News 2834, 2997. *But see* Staff of Senate Finance Comm., 90th Cong., 1st Sess., Summary of Social Security Amendments of 1967, *reprinted in* 113 Cong. Rec. 36306, 36311 (1967) ("The amendments provide that under State programs of aid to families with dependent children of unemployed parents,

This gender-based restriction on eligibility must be recognized for what it was, an effort to condition eligibility upon the unemployment of a family's principal wage-earner whom Congress broadly assumed to be the father. In *Schneider* v. *McNutt*,[42] where plaintiffs also challenged the constitutionality of the AFDC-UF program on sex-discrimination grounds, the three-judge District Court surmised that:

> [T]he decision of Congress to limit coverage to families with unemployed fathers was based on the assumption that the unemployment of fathers will create a greater burden on the family than the unemployment of mothers.[43]

Congress has traditionally spoken of the father when it meant to indicate the family's principal wage-earner. With specific reference to the AFDC-UF program, former Congresswoman Martha Griffiths has complained that:

> Like other income security programs, welfare reflects the assumption that the father is the breadwinner.[44]

Federal matching funds would be available only for the children of unemployed fathers. Under present law States may include children on the basis of the unemployment of mothers, as well as fathers."); 113 Cong. Rec. 36914 (1967) (remarks of Sen. Muskie) ("I object to the provision which restricts ADC benefits under the unemployment program to children of unemployed fathers . . .. This eliminates the current provision benefiting children of unemployed mothers.")

[42] C.A. No. 213-75C3 (W.D. Wash. March 28, 1977).

[43] *Id.*, slip op. at 9.

[44] Griffiths, *Sex Discrimination in Income Security Programs*, 49 Notre Dame Lawyer 534, 541 (1974).

In *Stevens* v. *Califano*,[45] where plaintiffs challenged the constitutionality of the AFDC-UF program on the same grounds which plaintiffs raised in this case, the District Court correctly observed that the role of the 1968 amendment was to implement Congress' original intention to condition AFDC-UF eligibility upon the unemployment of the family's principal wage-earner. The District Court stated that:

> Congress sought . . . to make the AFDC-U program conform with its original intent. The legislative history of the original enactment . . . [in 1961 indicated] that Congress did not intend the AFDC-U program to provide aid for working poor. Rather, it intended that the program provide aid to families in which the "breadwinner," or "wage earner" was unemployed. . . . The problem with the program, however, was that the language chosen in the original enactment only required one parent to be unemployed. Inasmuch as the AFDC-U program aided two parent families, said language permitted needy families in which the "breadwinner" was fully employed to receive benefits based upon the unemployment of the "non-breadwinner." . . . The purpose of the amendment to Section 607, therefore, was to eliminate benefits to families in which the breadwinner was fully employed.[46]

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[45] 448 F. Supp. 1313 (N.D. Ohio 1978), *appeal docketed*, 47 U.S.L.W. 3227 (1978) (No. 78-449, 1978 Term).

[46] *Id.*, 1320. The rulings in the *Stevens* decision nonetheless followed those in this case on the remedial as well as the constitutional issue. For an analysis of the District Court's rationale for its remedial order in *Stevens*, see *infra*, 37-40.

This legislative history demonstrates that Congress never intended to allow either parent's unemployment to establish a family's eligibility regardless of the other parent's employment status at that time. Adoption of the dual wage-earner model of the AFDC-UF program, which plaintiffs advocated below and which the District Court's final order sanctioned, would grossly increase the scope and cost of the AFDC-UF program beyond what Congress envisioned. By restricting the eligibility of intact families to those whose "breadwinner" was unemployed, Congress expressly conditioned eligibility upon the status of a specific parent within such families. This commitment to the principal wage-earner model is the dominant element in the legislative history of the AFDC-UF program.[47]

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[47] When it first adopted the temporary AFDC-UF program in 1961, Congress justified its extension of assistance to the families of jobless workers as necessary in order to treat needy children equally. *E.g.*, *1961 Hearings*, *supra* note 23, at 104 (remarks of Rep. Mills and Secretary Ribicoff); 107 Cong. Rec. 3767 (1961) (remarks of Rep. Byrnes) ("The justification for this bill is simply this: It is very difficult, if not impossible, to distinguish as far as the plight of the needy child is concerned between the child in the family of . . . a disabled breadwinner who cannot work, and the needy child in a family where the breadwinner is unable to find work of any kind in order to support his family."). When it voted to extend the AFDC-UF program in 1962, Congress again focused upon this principle of equality of treatment. The reports of the House Committee on Ways and Means and the Senate Finance Committee uniformly stated that:

> The committee believes that the children of unemployed parents deserve the same treatment as the children where the father is no longer in the home.

H.R. Rep. No. 1414, 87th Cong., 2d Sess. 15 (1962); S. Rep. No. 1589, 87th Cong., 2d Sess. 11 (1962), *reprinted in* [1962] U.S. Code Cong. & Ad. News 1943, 1953.

Subsequently, Congress came to place more emphasis upon the importance of the AFDC-UF program as a prophylactic for the incentive which the basic AFDC program gave fathers to desert their families. In 1967, when the

In light of section 407's legislative history, the District Court exceeded its remedial powers when it adopted the dual wage-earner model of the AFDC-UF program. In order to comply with the preeminent Congressional intent behind section 407, any sex-neutral extension of the AFDC-UF program allowing unemployed mothers to establish their families' eligibility must follow the principal wage-earner model.[48] The District Court's rejection of this model of a sex-neutral AFDC-UF program was, therefore, a reversible error of law.

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national AFDC caseload had doubled over the preceding decade, Congress attributed "a very large share of the program growth . . . to family breakup . . .." H.R. Rep. No. 544, 90th Cong., 1st Sess. 96 (1967); S. Rep. No. 744, 90th Cong., 1st Sess. 145 (1967), *reprinted in* [1967] U.S. Code Cong. & Ad. News 2834, 2981. In order to cure this deleterious side effect of the AFDC program, 113 Cong. Rec. 33193-95 (remarks of Sen Harris and Sen. Kennedy of New York) and 36817 (remarks of Sen. Mondale) (1967), the Senate voted to require states participating in the basic AFDC program to adopt an AFDC-UF program. 113 Cong. Rec. 33195 (1967). When the House resisted the imposition of a mandatory program upon the states, however, the Senate receded. 113 Cong. Rec. 36358 (1967); H.R. Rep. No. 1030, 90th Cong., 1st Sess. 58 (1967), *reprinted in* [1967] U.S. Code Cong. & Ad. News 3179, 3203-04.

This legislative history illustrates the genesis of Congress' understanding of the AFDC-UF program. While Congress came to recognize the interplay between the AFDC and the AFDC-UF programs, its original motivation for enacting section 407 was — at bottom — to provide assistance to the children of jobless workers. In order to justify this goal, it had predominantly relied upon the principle of equality of treatment.

[48] The remedy of extension may be exercised only to render what "Congress plainly did intend . . . constitutional." *Welsh* v. *United States*, 398 U.S. 333, 356 (1970) (Harlan, J., concurring).

C. *Section 407's Structure Substantiates the Correctness of the Principal Wage-Earner Model of the AFDC-UF Program.*

An analysis of the administrative framework of section 407 confirms the excessive sweep of the dual wage-earner model of the AFDC-UF program and, accordingly, its impropriety as a remedy for section 407's gender-based discrimination.[49] Under section 407, a family must meet both categorical and financial requirements for eligibility. The major categorical requirement is that the father must meet the federal definition of unemployment, *i.e.*, the father must be employed less than 100 hours per month.[50] The financial requirement is that the family's income may not exceed the AFDC standard of need.[51]

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[49] *Supra*, 11-14.

[50] 42 U.S.C. § 607(a) (1976); 45 C.F.R. § 233.100(a)(1)(i) (1977). Section 407 also contains a categorical work-history requirement that, in sum, the father must either (1) have earned fifty dollars or more in six calendar quarters (that is, periods of three consecutive months) within any thirteen-quarter period ending within one year of the application for assistance or (2) have received unemployment compensation within one year prior to the application for assistance. 42 U.S.C. § 607(b)(1)(C) (1976); 45 C.F.R. § 233.100(a)(3)(iii) (1977). By its institution of the work-history requirement in Pub. L. No. 90-248, § 203(a) (1968), Congress confirmed its focus upon the family's principal wage-earner. The work-history requirement disqualifies those fathers who have never in fact been breadwinners. *See* H.R. Rep. No. 544, 90th Cong., 1st Sess. 108 (1967) ("[I]t is the intent of your committee to exclude from the program those fathers who have not been in the labor force, or whose attachment to the labor force has been casual."); 113 Cong. Rec. 36785 (1967) (remarks of Sen. Kennedy of New York) ("This will cut out young fathers who have never been able to get a job and hold it for a substantial length of time.").

Other categorical requirements under section 407 state that the father must (1) have been unemployed for a thirty-day period prior to receiving assistance and (2) not have refused a bona fide offer of employment within that period without good cause. 42 U.S.C. § 607(b)(1)(A) and (B) (1976).

[51] 45 C.F.R. § 233.100(a)(1) (1977). Participating states are allowed to determine the standard of need for their respective AFDC programs. *Shea* v.

The principal wage-earner model retains the major categorical requirement by conditioning eligibility upon the principal wage-earner being employed less than 100 hours per month. By just requiring that either parent be unemployed, the dual wage-earner model undermines the categorical requirement so as to leave only the income test. It allows families to maintain eligibility longer than does the single-parent model, if not indefinitely, in the following manner. Whenever the parent whose unemployment originally established the family's AFDC-UF eligibility becomes employed for 100 or more hours per month, the other parent can nonetheless maintain the family's eligibility on the basis of his or her present unemployment.[52] This revolving arrangement is capable of indefinite repetition, as, for example, among families whose parents are chronically subject to intermittent unemployment.[53] To the

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Vialpando, 416 U.S. 251, 253 (1974). The standard of need represents the amount which the state deems necessary to sustain a hypothetical family at a subsistence level. Both the eligibility of a family and the amount of cash benefits which it will receive are determined through the comparison of its net income and available resources against the standard of need. 45 C.F.R. § 233.20(a)(3)(ii)(D) (1977). In determining the family's net income, the state must exclude "any expenses reasonably attributable to the earning of any such income." 42 U.S.C. § 602(a)(7) (1976). *See also* 45 C.F.R. § 233.20(a)(3)(iv)(a) (1977). If its net income (including available resources) is less than the standard of need, the applicant family is eligible for the AFDC program. Its cash grant will then be based upon the difference between its net income and the standard of need. 45 C.F.R. § 233.20(a)(2)(i) (1977). The state may select, however, the extent to which it will bring the family's income up to the standard of need. 416 U.S. at 253-54.

[52] This sketch simplifies the criteria established by section 407 for ease of presentation. One should bear in mind that, if the second parent is unable to meet any of the other criteria (*e.g.*, the work-history requirement), he or she will not be able to maintain the family's eligibility.

[53] In *Carroll* v. *Finch*, 326 F. Supp. 891 (D. Alaska 1971), where plaintiffs unsuccessfully sought to require the institution of an AFDC-UF program in Alaska, the District Court noted that:

> Because of the highly seasonal nature of employment in much of rural Alaska, the AFDC-UP program would have the practical effect

extent that one parent remains unemployed whenever the other parent is employed, economic circumstance could make a family continuously eligible for AFDC-UF benefits. Such a family would lose its eligibiity for AFDC-UF only (1) if its income, as reduced by the federal income disregard[54] and for work-related expenses,[55] were to exceed the AFDC standard of need, or (2) if both parents began to work for 100 or more hours per month. The dual wage-earner model thus far exceeds Congress' original vision of the AFDC-UF program as a temporary supplement to families whose breadwinners had been laid off in the course of an economic recession.[56]

The dual wage-earner model violates the legislative intent behind the AFDC-UF program because it would provide an

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of establishing a guaranteed annual income for those welfare recipients in outlying areas.

Id., 895 at n. 3.

[54] Federal law requires a state to disregard the first $30 earned by a recipient family in any month plus one-third of the remainder of the family's earned income in that month (as well as all earnings by dependent children who are students) when the state reassesses the family's need in order to determine (1) its continued eligibility for AFDC and (2) the size of the cash grant to which the family is entitled for that month. 42 U.S.C. § 602(a)(8) (1976); 45 C.F.R. § 233.20(a)(7) and (a)(11) (1977). The earned income disregard is available to families only after they have initially been found to be eligible for the AFDC program. The disregard is not available to families when they first apply to participate in the AFDC program. 45 C.F.R. § 233.20(a)(7)(ii) (1977).

[55] 42 U.S.C. § 602(a)(7) (1976); 45 C.F.R. § 233.20(a)(3)(iv) and (a)(7) (1977). See note 51, *supra*.

[56] *See* H.R. Rep. No. 28, 87th Cong., 1st Sess. 2 (1961); 107 Cong. Rec. 3759 (1961) (remarks of Rep. Lane) ("These are the youngsters . . . whom we want to help until the Nation pulls out of the recession, and the economy creates job opportunities that will put their providers to work again and enable them to support their families."). *See also Burr* v. *Smith*, 322 F. Supp. 980, 981, 983 (W.D. Wash. 1971).

income subsidy to the working poor.[57] The disregard of earned income and the deduction for work-related expenses allow an average recipient family to remain eligible for AFDC-UF benefits in Massachusetts until its gross income reaches the following levels[58]:

Maximum Earnings	Number of Family Members						
	3	4	5	6	7	8	9
Weekly	$234	$274	$314	$355	$395	$435	$475
Annually	$12,160	$14,250	$16,340	$18,440	$20,530	$22,620	$24,720

[57] In *Stevens* v. *Califano*, *supra* note 45, at 1320, the District Court recognized from its review of the legislative history that: "It is clear . . . that Congress did not intend the AFDC-U[F] program to provide aid for working poor." *Accord*, *Coon* v. *Ohio Department of Public Welfare*, No. C 75-925, slip op. at 14 (N.D. Ohio March 1, 1976); *Cheley* v. *Burson*, 324 F. Supp. 678, 681 (N.D. Ga. 1971), *appeal dismissed for failure to docket within proper time sub nom. Cheley* v. *Parnham*, 404 U.S. 878 (1971); *Macias* v. *Finch*, 324 F. Supp. 1252, 1260-61 (N.D. Cal. 1970), *aff'd without opinion sub nom. Macias* v. *Richardson*, 400 U.S. 913 (1970); *Hart* v. *Juras*, 17 Or. App. 566, 522 P. 2d 1399, 1400 (Or. App. 1974).

[58] This table reflects the application of the federally mandated disregard of earned income and deduction for work-related expenses to the present standard of need in Massachusetts. In accordance with the earned income disregard, Massachusetts disregards about one third of the earned income of working recipient families when it redetermines their eligibility and their level of benefits. According to the Department of Public Welfare's review of a one per cent sample of its AFDC caseload in 1976, the work-related expenses of working recipient families (which are excluded from their net income) amount to another third of their earned income. As a result of these two factors, only the remaining third of an average family's earnings is counted in the redetermination of its eligibility and level of benefits. In this table, therefore, the income eligibility limits of working recipient families represent the level at which one third of their gross earnings equals Massachusetts' standard of need. For example, the present standard of need for a four-person family is $395.50 per month. This figure incorporates the monthly consolidated grant and a *pro rata* portion of the quarterly payment. *See* 6 Mass. CHSR III, Subch. A, Pt. 304, Subpt. D, § 304.215, as amended

As presently structured, the AFDC-UF program controls this tendency toward providing an open-ended income subsidy through its major categorical requirement that the father must be employed for less than 100 hours per month. 45 C.F.R. § 233.100(a)(1)(i) (1977). The Commissioner has found that a family's eligibility terminates more often for categorical than financial reasons under the existing AFDC-UF program. Since it would remove that program's major categorical requirement, the dual wage-earner model would indefinitely supplement the income of a large number of intact families that are not needy by conventional standards.[59] These recipient families may, in combination with their earnings, own an automobile and a home because ownership of such assets does not affect their eligiblity for AFDC-UF benefits.[60]

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at Mass. Reg. Issue No. 88 at 128 (1977); 6 Mass. CHSR III, Subch. A, Pt. 304, Subpt. D, § 304.218, as amended at Mass. Reg. Special Issue No. 8 at 76 (1976). Since two thirds of its earnings will be discounted, a four-person recipient family will remain eligible for assistance as long as one third of its monthly gross earnings does not exceed $395.50. Dividing $395.50 by .333 produces the quotient of $1,187.68. A four-person family thus remains eligible for assistance until its income reaches $1,187.68 per month or approximately $14,250.00 per year. The annual income figures in this table are rounded off to the nearest ten. The weekly income figures are then derived by dividing the annual income by 52.

[59] In *Henry* v. *Betit*, 323 F. Supp. 418 (D. Alaska 1971), where plaintiffs unsuccessfully challenged Alaska's failure to institute an AFDC-UF program, the three-judge District Court observed that the program was "not designed to provide a guaranteed annual income to those who are capable of gainful employment." *Id.*, 425. In *Armstrong* v. *Candon*, 451 F. Supp. 1148 (D. Vt. 1978), where AFDC-UF applicants challenged certain work-related requirements imposed by Vermont, the District Court noted Vermont's concern that AFDC-UF was becoming "a way of life, rather than simply a temporary means of assisting unemployed fathers with families." *Id.*, 1152.

[60] 45 C.F.R. § 233.20(a)(3)(i) (1977); 6 Mass. CHSR III, Subch. A, Pt. 303, Subpt. A, § 303.21-22 [Mass. Reg. Special Issue No. 8 at 28-29 (1976)].

Recipient families would be able to maintain AFDC-UF eligibility despite their substantial incomes because the AFDC-UF program treats the incomes of recipient families differently than the incomes of applicant families. In order to provide recipients with an incentive to work, the incomes of recipients are reduced not only by their work-related expenses but also in accordance with the federally mandated income disregard.[61] When a household first applies for AFDC-UF benefits, only work-related expenses are deducted from its earned income before its net income is compared against the standard of need.[62] The following table compares the income eligibility limits for applicant and recipient households in Massachusetts in terms of annual income[63]:

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[61] For the legislative history of Pub. L. No. 90-248, § 202(b) (1968) enacting the income disregard, see H.R. Rep. No. 544, 90th Cong., 1st Sess. 106-07 (1967); S. Rep. No. 744, 90th Cong., 1st Sess. 157-59 (1967), *reprinted in* [1967] U.S. Code Cong. & Ad. News 2834, 2994-96.

[62] 45 C.F.R. § 233.20(a)(7)(ii) (1977). In their reports recommending the enactment of the earned income disregard for recipients in 1967, the House Committee on Ways and Means and the Senate Finance Committee uniformly stated that:

> One possible result of this provision is that one family, who started out below assistance levels, will have some grant payable at certain earnings levels because of the exemption of later earnings while another family which already had the same earnings will receive no grant. Your committee appreciates the objections to this type of situation which can be made; but the alternative would have increased the costs of the proposal by about $160 million a year by placing people on the AFDC rolls who now have earnings in excess of their need for public assistance as determined under their State plan. In short, the various provisions included in your committee's bill are designed to get people off AFDC rolls, not put them on.

H.R. Rep. No. 544, 90th Cong., 1st Sess. 107 (1967); S. Rep. No. 744, 90th Cong., 1st Sess. 159 (1967), *reprinted in* [1967] U.S. Code Cong. & Ad. News 2834, 2996.

[63] In its calculation of the income eligibility limits of AFDC applicants, this table assumes that their work-related expenses would, similarly to those of

Maximum Earnings	Number of Family Members						
	3	4	5	6	7	8	9
AFDC *Recipients*	12,160	14,250	16,340	18,440	20,530	22,620	24,720
AFDC *Applicants*	6,070	7,120	8,160	9,210	10,250	11,300	12,340

The discrepancy in eligibility limits demonstrates that a dual wage-earner model would extend the scope of the AFDC-UF program far beyond the legislative goal of temporary assistance to families subjected to unemployment. Given the differential between the income limits for applicant and recipient households, a household determined to be eligible may then remain eligible until it doubles its original income. For a family of five, this means that, if the family qualifies when it has a gross annual income of $8,160, it can continue to receive AFDC benefits as long as its total earnings do not exceed $16,340 per year. The result is an income subsidy for those working poor who meet the initial eligibility limit at some point in time. Without the major categorical requirement embodied in the principal wage-earner model, the AFDC-UF program overflows the modest channel which Congress de-

AFDC recipients, equal one third of gross earnings. Under this assumption, the income eligibility limit of an applicant family equals the level at which two thirds of its gross earnings equal the standard of need. For example, the standard of need for a family of four is $395.50. Dividing $395.50 by .667 produces the quotient of $592.95. A four-person family is thus eligible to begin receiving assistance until its gross income reaches $592.95 per month or approximately $7,120.00 per year. The annual income figures for AFDC applicants in this table are rounded off to the nearest ten.

vised "to provide temporary aid to the needy children of jobless workers."[64]

D. *The District Court Improperly Failed to Assess the Comparative Costs of the Alternative Remedies as an Index of How Congress Itself Would Have Chosen to Correct Section 407's Underinclusiveness.*

The District Court failed to consider the cost differential between the principal wage-earner and the dual wage-earner models of the AFDC-UF program as an index of Congressional intent when it selected a remedy for section 407's underinclusiveness. This omission violated the precept that:

> [T]he feasibility of accommodating the administrative framework and legislative goals of a statute should be a primary consideration in deciding whether to extend it. Surely one of the legislative goals to be considered in extending a benefit paid for out of public funds is the additional toll that will be taken on the public fisc by adding to the class of persons entitled to the benefit. Each extension of a benefit in such a case involves a corresponding increase in the burden on the taxpayers.[65]

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[64] 107 Cong. Rec. 3759 (1961) (remarks of Rep. Lane). Section 407's work-history requirement would not counteract the open-ended eligibility which the dual wage-earner model of the AFDC-UF program permits. The work-history requirement means only that a parent must have earned $300.00 over a period of 39 months within one year of the date of an application for assistance. See note 50, *supra*. This requirement poses little difficulty for applicants other than "the hard-core, long-term unemployed." 113 Cong. Rec. 36817 (1967) (remarks of Sen. Mondale).

[65] Note, *Extension Versus Invalidation of Underinclusive Statutes: A Remedial Alternative*, 12 Colum. J.L. and Soc. Probs. 115, 134 (1975).

When considering whether to extend an underinclusive statute, federal courts have often considered the incremental costs associated with its extension. *E.g.*, *Jablon* v. *Secretary of Health, Education and Welfare*, 399 F. Supp. 118, 132 (D. Md. 1975), *aff'd*, 430 U.S. 924 (1977); *Moreno* v. *U.S. Department of Agriculture*, 345 F. Supp. 310, 315-16 (D. D.C. 1972), *aff'd*, 413 U.S. 528 (1973). In *Jablon*, the District Court decided to extend the statute on the ground that the restrictive remedy of requiring wives as well as husbands to demonstrate dependency would be more costly for administrative reasons than the expansive remedy of enjoining the enforcement of the requirement that husbands must demonstrate dependency. Similarly, in *Moreno*, the court chose to extend the statute because extension would not require "the expenditure of public funds to a greater extent than now authorized." 345 F. Supp. at 316.

The Commissioner estimates that, once the expanded programs were fully operational, the net incremental cost in AFDC benefits of operating the dual wage-earner model in Massachusetts would be $23,000,000 per year, as compared with $3,300,000 per year for the principal wage-earner model.[66] The dual wage-earner model would, therefore, cost $19,700,000 more per year than the principal wage-earner model in Massachusetts alone. The significance of this differ-

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[66] Affidavit of Jenny Netzer in Support of Defendant Sharp's Motion to Clarify or, Alternatively, to Amend the Court's Order of April 20, 1978 [Netzer Affidavit], ¶¶ 3 and 14 (A. 49-50, 54-55). These estimates refer to the incremental cost of AFDC benefits prior to the division of that cost between the federal and the state governments pursuant to 42 U.S.C. § 603 (1976). These estimates do not include the cost of the Medicaid benefits which these additional AFDC-UF recipients would receive pursuant to 42 U.S.C. § 1396a(a)(10) (1976). In his jurisdictional statement in *Califano* v. *Westcott*, No. 78-437, p. 7 at n. 6, the Secretary estimated that the overall incremental cost to the federal and the participating state governments of providing AFDC and Medicaid benefits in accordance with an extended AFDC-UF program would be $471,900,000 in fiscal year 1980.

ence is magnified when one considers that the $23,000,000 dual wage-earner remedy would almost double the annual cost of the AFDC-UF program in Massachusetts, which stood at approximately $30,000,000 prior to the District Court's ruling.[67] The higher cost of the dual wage-earner model is a product of its propensity to allow more families to establish initial eligibility and its lesser capacity to reassess the eligibility of a recipient family in light of changes in the parents' employment status.

When considering the proper extension of an underinclusive classification, the judiciary should hold firmly in mind the legitimate importance which Congress places upon the fiscal integrity of federal-state welfare programs.[68] In *Quern* v. *Mandley*, 436 U.S. 725 (1978), this Court rejected a challenge to Illinois' Emergency Assistance Program which asserted that Illinois had impermissibly narrowed the definition of eligibility established by 42 U.S.C. § 406(e) (1976). Noting the extreme breadth of the definition of eligibility advocated by the plaintiffs, this Court declined to impute to Congress the intention to create "an entirely open-ended program not susceptible of meaningful fiscal or programmatic control by the States."[69] The comparative incremental costs of the principal wage-earner and dual wage-earner models suggest that Congress would have enacted the less expensive form of a sex-neutral

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[67] Netzer Affidavit, ¶ 15 (A. 55). If the eligibility of the existing caseload were redetermined in accordance with the requirement that the family's principal wage-earner must meet the categorical requirements of section 407, the cost of the existing caseload would decrease. Those recipient families where the mother qualified as the principal wage-earner but failed to meet the categorical requirements of section 407 would no longer be eligible.

[68] *E.g.*, *Dandridge* v. *Williams*, 397 U.S. 471, 478 (1970). *See* Note, *Extension Versus Invalidation of Underinclusive Statutes: A Remedial Alternative*, 12 Colum J.L. and Soc. Probs. 115, 128-40 (1975).

[69] *Quern* v. *Mandley*, 436 U.S. 725, 746 (1978).

AFDC-UF program if it, rather than the Court, were undertaking to remedy the underinclusiveness of the current program.[70]

By its selection of the dual wage-earner model which departs so substantially in cost and structure from Congress' conception of the AFDC-UF program, the District Court exceeded its "presumed grant of power . . . to render what Congress plainly did intend, constitutional."[71] Its remedy, therefore, violates the principle of separation of powers.[72]

E. *The Present Availability of AFDC-UF Benefits to Families Where the Mother is Fully Employed Does Not Require the Adoption of the Dual Wage-Earner Model of the AFDC-UF Program.*

While the preceding argument addresses the District Court's reasons for its choice of remedy, Judge Contie developed an independent rationale in *Stevens* v. *Califano* for his selection of the same dual wage-earner model to remedy section 407's constitutional defect. Although he recognized that Congress had designed the AFDC-UF program to assist "needy families in which both parents were unemployed," he nonetheless selected the dual wage-earner model because "AFDC-UF benefits are already available to needy families with unemployed

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[70] In order to reconstruct the picture of the AFDC-UF program which Congress had before it in 1967, one should recall that the AFDC-UF caseload in Massachusetts consisted of 650 families with 2,500 children in May, 1967. 113 Cong. Rec. 33630 (1967) (remarks of Sen. Kennedy of Massachusetts). By way of contrast, the dual-parent model would now add an additional 8,000 families to the program while the single-parent model would add only another 700 families. Netzer Affidavit, ¶¶ 3 and 14 (A. 49-50, 54-55).

[71] *Welsh* v. *United States*, 398 U.S. 333, 356 (1970) (Harlan, J., concurring).

[72] *Supra*, 11-14.

fathers in which the mother is fully employed."[73] In order to treat unemployed mothers equivalently, Judge Contie extended the AFDC-UF program to include "needy families with unemployed mothers . . . whose husbands are fully employed."[74]

The background for Judge Contie's analysis in *Stevens* lies in *Coon* v. *Ohio Department of Public Welfare*,[75] an earlier decision pertaining to Ohio's AFDC-UF program which Judge Contie cites in his opinion.[76] The plaintiff father in *Coon* had challenged the AFDC-UF rule that he must be employed for less than 100 hours per month on the theory that the rule was gender-biased because it did not also apply to the female parent in a family receiving AFDC-UF benefits. In its opinion, the three-judge District Court considered an Ohio regulation that:

> The fact that the mother is fully employed does not preclude establishing eligibility if the family is in need and the father is unemployed.[77]

Upon comparing the Ohio regulation with the federal regulation defining a father's unemployment for purposes of AFDC-UF,[78] the Court then observed that:

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[73] *Stevens* v. *Califano*, *supra* note 45, at 1323, n. 11.

[74] *Stevens* v. *Califano*, *supra* note 45, at 1323, n. 11.

[75] No. C 75-925 (N.D. Ohio March 1, 1976).

[76] *Stevens* v. *Califano*, *supra* note 45, at 1320.

[77] *Coon* v. *Ohio Department of Public Welfare*, No. C. 75-925, slip op. at 10 (N.D. Ohio March 1, 1976). While the Massachusetts Department of Public Welfare does not have a regulation similar to the Ohio regulation, it has not denied applications for AFDC-UF benefits in cases where the father was unemployed because of the mother's concurrent employment.

[78] 45 C.F.R. § 233.100(a)(1)(i) (1977).

> While the federal regulation contains no similar sentence, it has the same effect. Since eligibility for ADC-U does not depend upon the mother's status, the 100-hour rule is inapplicable to her and therefore she can work more than 100 hours.[79]

In light of this reading of the federal and state law governing the AFDC-UF program in Ohio, Judge Contie apparently understood the state practice of disregarding the mother's employment status to be binding upon him.

Judge Contie's reliance upon this state practice as authority for the adoption of a dual wage-earner model is misplaced. That practice did not itself institute a dual wage-earner model, since the AFDC-UF program still retained the categorical requirement that the father must be unemployed.[80] This categorical requirement served to preclude the revolving arrangement by which one parent's unemployment can maintain AFDC-UF eligibility whenever the other parent begins to work 100 or more hours per month.[81] The practice of disregarding the mother's employment status under the current

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[79] *Coon* v. *Ohio Department of Public Welfare*, *supra* note 77, at 10. The court later declared that:

> [T]he statutory scheme indicates, and this court determines, that mothers in ADC-U families are not limited in the number of hours they can work because mothers, unlike fathers, cannot qualify their families for ADC-U in the first place.

Id. at 16-17.

[80] *See Coon* v. *Ohio Department of Public Welfare*, *supra* note 77, at 14 ("Although plaintiff challenges the gender-based classification embodied in the 100-hour ceiling on employment, plaintiff ignores the gender-based classification upon which the entire AFDC-UF program rests."). *See also id.*, 16-17.

[81] *Supra*, 27-29.

AFDC-UF program does not, therefore, constitute a precedent for the implementation of the dual wage-earner model.

To the extent that section 407's legislative history supports a definition of eligibility which disregards the concurrent employment of the non-breadwinner parent,[82] the principal wage-earner model conforms to that legislative history in an appropriately sex-neutral manner. The principal wage-earner model would disregard the other parent's employment once the family's principal wage-earner had been identified. The goal of the principal wage-earner model is only to condition AFDC-UF benefits upon the unemployment of that parent who is in fact the family breadwinner.[83]

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[82] *See* 107 Cong. Rec. 3765 (1961) (remarks of Reps. Dominick and Mills); *Public Assistance Act of 1962: Hearings Before the Senate Committee on Finance on H.R. 10606*, 87th Cong., 2d Sess. 112-36 (1962) [hereinafter cited as *1962 Hearings*]. In the hearings before the Senate Finance Committee on the extension of the AFDC-UF program in 1962, Secretary Ribicoff of Health, Education and Welfare (HEW) introduced an HEW report on the operation of the AFDC-UF program in thirteen states from May to November, 1961. Appendix 4 to that report indicated that some states had defined eligibility in terms of the unemployment of either parent. *1962 Hearings*, 118-22. Congress was thus aware in 1962 of the various definitions of eligibility established by the states. Of course, in 1967, it fashioned a more uniform definition of eligibility. See note 41, *supra*. *See also Stevens* v. *Califano*, *supra* note 45, at 1320-21.

[83] The Court should be aware that implementation of the principal wage-earner model of the AFDC-UF program, as proposed by the Commissioner, would terminate certain recipient families who are presently eligible on the basis of the father's unemployment. The determinant characteristic of these families would be the present employment for 100 or more hours per month of a mother who would qualify as the principal wage-earner. However, an otherwise justifiable reformulation of the AFDC-UF program which, *inter alia*, terminates the eligibility of such families does not, by virtue of such termination, offend the Constitution, as plaintiffs may argue. For example, federal courts have rebuffed a constitutional challenge to Maine's decision to discontinue participation in the AFDC-UF program. *United Low Income, Inc.* v. *Fisher*, 340 F. Supp. 150 (D. Me. 1972), *aff'd*, 470 F. 2d 1074 (1st Cir. 1972).

Conclusion

For the reasons set forth above, the Court should reverse the District Court's order concerning remedy, dated August 9, 1978, and remand the case to the District Court for entry of a remedial order consonant with the principal wage-earner model of the AFDC-UF program proposed by the Commissioner.[84]

Respectfully submitted,

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[84] Remand would similarly be appropriate if this Court were to decide that the Secretary retained the discretion under section 407 to choose between the principal wage-earner and the dual wage-earner models of the AFDC-UF program.